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BARBARA GRUTTER, *Petitioner* v. LEE BOLLINGER, *et al.*, *Respondents*

JENNIFER GRATZ, *et al.*, *Petitioners* v. LEE BOLLINGER, *et al.*, *Respondents*

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

The *Amici* are eleven organizations[2] involved in elementary and secondary education that share a profound

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[1] The *Amici* file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States. NSBA represents the nation's 95,000 school board members who govern our nation's 14,772 local school districts.

The National Association of State Boards of Education is a nonprofit association that represents state and territorial boards of education.

The Public Education Network ("PEN") is a national organization of local education funds and individuals working to improve public schools and build citizen support for quality public education in low-income communities across the nation. PEN and its members are building public demand and mobilizing resources for quality public education on behalf of 10.6 million children in more than 1,200 school districts in 30 states and the District of Columbia.

The National Association of Secondary School Principals serves more than 34,000 education officials in middle level schools and high schools, including administrators, teachers, students, and others interested in the education and welfare of today's youth.

The National Association of Independent Schools ("NAIS") is a nonprofit organization of over 1,100 independent, elementary and secondary schools in the United States and abroad. NAIS also represents myriad other independent school associations across the country. NAIS member schools are implicated by the present cases under Title VI of the Civil Rights Act of 1964 to the extent the schools receive federal funds.

The Council of the Great City Schools is a coalition of 57 of the largest urban public school systems in the United States.

The Horace Mann League was founded in 1922 to perpetuate the ideals of Horace Mann, the founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a necessary unifying and dynamic influence in American life.

commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive citizens in our society. As part of that commitment, the *Amici* are strongly supportive of the authority of state and local education officials to promote the essential educational benefits of diversity, including racial and ethnic diversity, in a school's student body. The *Amici* submit this brief to draw this Court's attention to vital issues of law and educational policy of which the Court should be aware as it considers the present cases.

The elementary and secondary education setting is distinct in several ways from the higher education context at issue in these cases. The issues related to race-conscious policies in elementary and secondary schools are not directly before this Court. At the same time, this Court's ruling on the constitutional issues under consideration could affect the authority of elementary and secondary schools (public and private) to create the kinds of diverse educational environments that strengthen the educational experience for all students. Moreover, there are core

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Magnet Schools of America is a nonprofit educational organization formed to promote equity, excellence, innovation, and the reduction of minority isolation in American education.

The National Alliance of Black School Educators is a nonprofit organization of 5,000 members, constituting the largest network of black educators in the nation.

The National Association for Multicultural Education is the primary membership organization addressing issues of multicultural education throughout the United States.

The Michigan School Boards Association, an NSBA federation member, represents the public school boards of the state of Michigan. The Michigan Association of School Boards is composed of 600 boards of education committed to advancing the quality of public education in their state.

educational principles in the elementary and secondary education context that affirm the position of the University of Michigan with respect to its compelling interest in promoting the educational benefits of a diverse learning environment.

SUMMARY OF THE CASE

This is the consolidation of two cases, both challenging admissions policies of the University of Michigan under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

The plaintiffs in *Gratz v. Bollinger* challenged the admissions polices of the University of Michigan undergraduate program. The university's current admissions policy considers an applicant's race as one of several factors during the admissions process. The plaintiffs are a group of unsuccessful applicants who allege that both the admissions policy in place at the time they applied in 1997 and the current policy violate Title VI and the Equal Protection Clause.

Grutter v. Bollinger involves the admissions policy for the University of Michigan Law School. The plaintiffs are unsuccessful applicants who allege that the school's consideration of race, as one factor among many, in its admissions process violates Title VI and the Equal Protection Clause.

The University of Michigan contends that its interest in promoting the educational benefits of a diverse student body is a "compelling state interest" and the admissions policies are "narrowly tailored" to serve that interest.

SUMMARY OF THE ARGUMENT

Public education serves a vital role as a cornerstone of America's democratic society. Diversity, including racial and ethnic diversity, is a vital tool for ensuring a complete educational experience. Yet as our nation grows increasingly diverse, our nation's public schools are becoming increasingly segregated.

Particularly in the face of these conditions, the *Amici* urge this Court to preserve the range of discretion historically conferred upon state and local education officials to promote their core educational goals, including the educational benefits of diversity.

The establishment of a diverse student body in elementary and secondary schools promotes several core educational benefits for all students that can be sufficiently compelling to justify limited race-conscious policies. A strong basis in evidence shows that diversity enhances students' civic values, improves student learning, improves students' preparation for employment, and increases educational opportunities. Moreover, current law provides meaningful, judicially enforceable limiting principles that guide and restrict the discretion of school officials when pursuing compelling educational interests through race-conscious measures.

This Court should acknowledge the discretion afforded elementary and secondary education officials, acting within longstanding constitutional parameters, to pursue their core educational mission based on appropriate evidence — even when, in limited circumstances, their decisions may include the consideration of race.

ARGUMENT

I. In elementary and secondary education, constitutional principles are shaped by the unique mission of schools and the authority of education officials to pursue that mission.

Constitutional principles do not exist in a vacuum. Longstanding precedent regarding the application of constitutional standards establishes that context matters.[3] In the context of elementary and secondary education, federal courts have resolved constitutional issues with particular sensitivity to (1) the unique mission of public schools and (2) principles of federalism and judicial restraint.[4]

This Court has long held that constitutional rights are uniquely shaped by the mission and role of public education and must be interpreted "in light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). When considering the application of constitutional rights in elementary and secondary education, under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, this Court has construed students' constitutional rights to permit school officials to carry out their educational mission.[5]

Moreover, this Court has long recognized that education is uniquely within the purview of state and local governments.[6] State and local education officials have education-policy expertise not possessed by federal courts.

> [P]ersistent and difficult questions of educational policy [are areas] in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education . . . presents a myriad of [sic] 'intractable economic, social and even philosophical problems.' . . . [T]he judiciary would be well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

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[3] *See generally Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("[T]he character of every act depends on the circumstances in which it is done.").

[4] Correspondingly, decisions of higher education officials that are within the "'four essential freedoms' of a university are entitled to judicial deference." *See Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result), *cited with approval in Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). Notably, principles of academic freedom (among others) afford discretion to higher education officials to pursue "that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). These principles inform the relative balance of constitutional values in the higher education arena.

[5] *See, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982); and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (all involving First Amendment rights); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (involving Fourth Amendment rights); *Goss v. Lopez*, 419 U.S. 565 (1975) (involving Fifth Amendment rights); *Ingraham v. Wright*, 430 U.S. 651 (1977) (involving Eighth Amendment rights); *Plyler v. Doe*, 457 U.S. 202 (1982) (involving Fourteenth Amendment rights). In each of these cases, this Court balanced students' constitutional rights against the unique mission of the public school.

[6] This Court in *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), stated that "education is perhaps the most important function of state and local governments."

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973). Moreover, state and local education officials have the primary authority and responsibility to make education policy decisions.[7] Thus, federal courts, including this Court, have long held that state and local education officials are entitled to substantial deference when pursuing their core educational mission.[8]

Taken together, these foundations call upon this Court to affirm the educational discretion properly vested in state and local education officials, acting within longstanding constitutional parameters, to pursue their core educational mission, including with regard to issues concerning race and racial diversity.[9]

II. Issues of race remain central to fulfilling the mission of elementary and secondary schools.

State and local education officials are responsible for the education of our nation's youth and the inculcation of values central to our diverse democracy. They must have the authority and discretion to make education policy judgments central to their core mission, including with regard to issues concerning race.

History and present conditions affirm an indisputable point in the context of elementary and secondary education: race matters.[10] Beginning with this Court's opinion in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), our nation has struggled, in fits and starts, to promote integration and equality of opportunity in public education, historically as a matter of law and more recently as a matter of sound education policy. Yet even as our nation grows more diverse, multicultural, and multilingual,[11] our public schools are in many places

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[7] *E.g., Goss v. Lopez*, 419 U.S. at 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... By and large, public education in our Nation is committed to the control of state and local authorities."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 480 U.S. 260, 273 (1988) ("This is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.") (citations omitted).

[8] As stated in *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971), "School authorities have wide discretion in formulating school policy."

[9] In general, throughout this brief, the term "race" is used to connote both "race" and "ethnicity." Further, the term "diversity" generally refers to diversity based on race and ethnicity as two – and only two – of several elements that constitute diverse learning environments in the elementary and secondary education context.

[10] The argument that race matters does not disavow the goal of building a "race blind" society (in the sense of a nation where people are not treated differently because of the color of their skin). Rather, the question is: What is more likely to achieve that goal – permitting limited race-conscious actions where necessary to build diverse education environments where children can learn and grow together, or prohibiting any race-conscious action to promote diversity and thereby ensuring that students learn in increasingly segregated settings?

[11] Census data confirm that the fabric of the U.S. population in this century will be woven from racially diverse strands. Today, our nation's population is approximately 69.1 percent white/non-Hispanic, 12.5 percent Hispanic, 12.3 percent black, 3.6 percent Asian/Pacific Islander, and 0.9 percent American Indian/Alaska Native. *See Overview of Race and Hispanic Origin: Census 2000 Brief*, U.S. Census Bureau at 3 (Mar. 2001); *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000*, Table 3, U.S. Census Bureau (Apr. 2001). By 2050, the percentage of the population that is white/non-Hispanic is projected to decrease to approximately 52.8 percent. *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, Population Projections Program, Population Division, U.S. Census Bureau (Jan. 13, 2000). Among students enrolled in elementary and high schools today, approximately 61 percent are white/non-Hispanic, 17 percent are black, and 16 percent are Hispanic. Erika Frankenberg, *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Table 2, Report of the Civil Rights Project, Harvard University at 24 (Jan. 2003). Since 1968,

becoming more segregated,[12] with persistent gaps in educational opportunity and achievement.[13] These trends

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the proportion of white students enrolled in public schools has decreased by 5.9 percent, while the proportion of black students has increased by 1.8 percent and the proportion of Hispanic students has increased by 283 *percent*. *Id.* at 23. This increasing diversity is reflected in varying ways and degrees in all regions of the country, urban, suburban, and rural. *Id.* at 27.

[12] Today, nearly three-fourths of all black and Hispanic students attend predominantly minority schools, and more than one-third of black and Hispanic students attend schools with greater than 90 percent minority enrollment. Frankenberg, *et al.*, *supra* note 11 at 33. "The racial trend in the school districts studied is substantial and clear: [V]irtually all school districts analyzed are showing decreased levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp. Despite an increasingly racially diverse public school enrollment, white students in over one-third of the districts analyzed became more segregated." *Id.* at 4. *See also* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Jeanne Weiler, *Recent Changes in School Desegregation*, 133 ERIC CLEARINGHOUSE ON URBAN EDUC. DIGEST 4 (1998). In addition, more than 85 percent of high-minority schools are also high-poverty schools, often struggling with the many challenges associated with concentrated disadvantage. Frankenberg, *et al.*, *supra*, note 11 at 36.

[13] Despite some important progress, data indicate that minority students have less access than nonminority students to key educational resources, and the funding necessary to secure those resources. *Dear Colleague Letter* from Secretary Richard Riley, U.S. Department of Education, Jan. 19, 2001 ("I am concerned about long-standing racial and ethnic disparities in the distribution of educational resources, including gaps in access to experienced and qualified teachers, adequate facilities, and instructional programs and support, including technology, as well as gaps in the funding necessary to secure these resources. Despite important progress, evidence shows that disparities in access to these educational resources remain – with too many minority children isolated in schools and school districts with far too little opportunity."). In most states, school districts with high minority enrollment receive fewer state and local funds than districts with low minority enrollment. *E.g.*, *The Funding Gap: Low-Income and Minority Students Receive Fewer Dollars*, Report of the Education Trust (Aug. 2002); Council of Great City Schools, *Adequate Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools,*

will continue if state and local school officials are not able to pursue multiple strategies to promote diversity and improve education for all children.[14]

Given these conditions, race matters to the core mission of elementary and secondary education in at least two fundamental ways: (1) to ensuring that all students are fully prepared to be productive citizens in our diverse democratic society; and (2) to ensuring that all students have the opportunity necessary to achieve high standards.

These goals are central to the mission of elementary and secondary education.[15] Moreover, diversity in a student

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available at www.cgcs.org (2002). This translates into fewer educational resources for minority students. For example, data show that, in many states, minority students have less access than nonminority students to highly qualified teachers with a college major in their subject area, even when controlling for poverty. *E.g.*, Kati Haycock, *Good Teaching Matters . . . A Lot*, 3 THINKING K-16, 3-15 (Summer 1998); Paragraph 44, Independent Review (Report #18) – SFUSD Consent Decree, July 30, 2001; Education Finance Statistics Center, National Center for Educational Statistics, *at* http://www.nces.ed.gov/edfin.

[14] In large part, the higher education community would be in a better position regarding diversity if diversity had been achieved already at the elementary and secondary level. Currently when students look to higher education, they are not starting on a "level playing field." Many of them are hampered by limited educational opportunities at the elementary and secondary level. This limits their aspirations and their possibilities for college and careers. It is also important to note that the extent to which "percentage plans" will promote diversity in higher education likely depends on the extent of segregation in elementary and secondary education. This creates the perverse situation under such plans whereby efforts to decrease racial segregation in public schools would also decrease diversity in public colleges and universities.

[15] *See, e.g.*, Linda Darling Hammond, *Education, Equity and the Right to Learn*, THE PUBLIC PURPOSE OF EDUC. AND SCHOOLING 41 (John Goodlad & Timothy McMannon eds., 1997); No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002) (holding all states, districts, and schools accountable for closing achievement gaps, expressly including gaps

body, including racial and ethnic diversity, is a vital tool for achieving these goals[16] and preparing all students to reach their full potential and succeed in our society – intellectually, democratically, and economically.[17] With regard to issues of race, this Court should not categorically (and arbitrarily) limit state and local education officials to the constitutionally minimum steps[18] they are required to take to remedy prior discrimination.[19]

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among racial and ethnic subgroups, and supporting efforts to "foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education").

[16] *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body."); *Hartzell v. Connell*, 679 P.2d 35, 40-41 (Cal. 1984) (noting that "education serves as a 'unifying social force' among our varied population, promoting the cohesion based upon democratic values. The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together 'in harmony and mutual respect.'").

[17] It is important to note in this sense that attention to diversity is designed to address contemporary issues, not to redress past wrongs. Further, this argument is not about *requiring* state and local education officials to take race-conscious actions to pursue the educational benefits of diversity or other nonremedial interests. Rather, the interest of the *Amici* is in ensuring that school officials have an appropriate range of educational options when making an array of context-specific decisions that affect the education of students they serve, including establishment of school attendance zones, establishment of student assignment policies, promulgation of transfer policies, establishment of magnet schools or special admissions academies, and adoption of policies that permit controlled choice. *See* EDWIN C. DARDEN, ET AL., FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT'S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT AND THE LAW (National School Boards Association Council of Urban Boards of Education 2002).

[18] *See, e.g., Keyes v. School. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) ("Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the

III. The educational benefits of diversity are sufficiently compelling to justify limited race-conscious actions.

This Court has held, under both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, that race-conscious programs that confer material benefits[20] are

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values of an integrated school experience."); *Bustop, Inc. v. Board of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J.) (denying a stay of a race-conscious student assignment plan, saying that he doubted the constitutional need for such a plan but that "I have very little doubt that [the board] was permitted by the Constitution to take such action.").

[19] Moreover, to so limit state and local education officials to remedial interests in the context of the present cases would violate the long-standing tenet of this Court pursuant to which its constitutional rulings are based upon specific facts presented. *E.g., Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001) ("We decline to accept the dissent's invitation to make a foray into dicta and address other situations not before us."); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[T]he importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process.'") (citations omitted); *Ashwander v. Tennessee. Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that this Court should refuse to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

[20] It is important to note that where race is used in elementary and secondary education, it is frequently considered as one factor among many when assigning students among similarly situated schools, which may not condition or deny material benefits to any student in a manner that would implicate strict scrutiny. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 137 F. Supp. 2d 1224, 1230 (W.D. Wash. 2001), *rev'd on other grounds*, 285 F.3d 1236 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002) ("The Ninth Circuit has identified two different types of government programs that take race into account. On the one hand are 'affirmative action' programs. . . that use racial minority status as a positive factor, conferring a government benefit to members of a minority at the expense of those in the majority. On the other hand are measures, such as those designed to effect racially integrated public schools, that

subject to "strict scrutiny." Such programs will be upheld only where there is a sufficient basis in evidence to support the determination that the given program serves a "compelling interest" and is "narrowly tailored" to achieve that interest. *See, e.g., Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995). Although this establishes a high bar, a clear majority of this Court has held that "strict scrutiny" is not "fatal in fact." *Id.* at 237, 275.

In the elementary and secondary education context, there are several compelling nonremedial interests that can justify race-conscious policies.[21] Chief among these is the interest in promoting the educational benefits of diversity, including racial and ethnic diversity, in the school

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seek to ensure that a benefit, available to all, is distributed in a manner that the governing body has decided will benefit the citizenry as a whole."); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (dictum) ("[T]he Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school."). For a thorough discussion of these cases see, Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63 (2003).

[21] Nonremedial interests may be as "compelling" as remedial interests. "A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), (Posner J.), *cert. denied*, 519 U.S. 1111 (1997). The present cases before this Court do not implicate a school district's remedial interest (and obligation) to overcome discrimination, which clearly constitutes a compelling interest in the elementary and secondary education context (and others). *See Richmond v. J.A. Croson*, 488 U.S. 469, 491-92 (1989) (plurality opinion). This remedial interest of school districts to desegregate effectively is not addressed in this brief.

environment. In this sense, it is important to understand that diversity is not an end in itself. Rather, it is a tool that may be sought by state and local education officials because it can promote several core educational benefits for all students. It is those educational benefits of diversity, individually or collectively, that can be sufficiently compelling to justify the use of limited race-conscious policies. *See, e.g.*, Edwin C. Darden, *et al.*, FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT'S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT AND THE LAW 4 (National School Boards Association Council of Urban Boards of Education 2002).

A. Diversity prepares students to be productive citizens in our diverse democratic society.

Of primary relevance to the present cases, creating diverse learning environments promotes the compelling educational goal of preparing all students to become productive citizens in our diverse democratic society.[22]

As this Court made clear nearly 50 years ago: "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." *Brown*, 347 U.S. at 493.

Decades of experience and relevant research confirm the educational benefits of a diverse learning environment

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[22] *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (discussing the "singular importance" of public elementary and secondary schools "in preparation of individuals as citizens and in the preservation of values on which our society rests"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing "the public schools as the most vital civic institution for the preservation of a democratic system of government").

in the elementary and secondary education context – benefits that are integral to the mission and purpose of education in America.[23] These interests have been reinforced repeatedly by federal courts and by Congress.[24]

Instilling in all students the full range of knowledge, skills, and values necessary for success in our diverse, democratic nation and world is not something that can be fully achieved only through textbook learning. Simply put, children learn from their environments, not just from their books.

1. Diversity enhances students' civic values.

Creating a diverse learning environment in elementary and secondary education improves students' civic development by breaking down racial boundaries and stereotypes and by reinforcing the social and moral values of American democracy. A diverse learning environment can imbue students with the tolerance, respect, and confidence necessary to be good citizens in our increasingly diverse, democratic society. For example, studies show that students educated in diverse environments have an increased sense of civic engagement, are less likely to harbor

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[23] *See, e.g.*, NSBA DIVERSITY GUIDE *supra* note 17 at 4-5 (describing the educational benefits of diversity in elementary and secondary education and providing a summary of social science research linking diversity to these benefits).

[24] *See, e.g., Bakke*, 438 U.S. at 312 (1978) (Powell, J.) ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body. "); No Child Left Behind Act of 2001, 20 U.S.C.§ 7231(a)(4) (2002) ("It is in the best interests of the United States- (A) to continue the Federal Government's support of local educational agencies that are . . . voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education.").

negative racial stereotypes, and are more likely to live and work in integrated settings.[25] Importantly, this benefit does not in any way depend on judgments about race and viewpoint. Whether diversity teaches students to recognize differences or similarities (or both), this civic mission will be greatly enhanced.

> [O]ne of the most important lessons the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

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[25] *See, e.g.*, R.E. Slavin, *Cooperative Learning and Intergroup Relations*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 628 (1995) (cooperative learning in diverse schools can improve racial attitudes among all students, including increased cross-racial friendships, with effects sustained beyond the learning group); R.E. Slavin, *Effects of Biracial Learning Teams on Cross-racial Friendships*, 71 J. OF EDUC. PYSCH. 381 (1979) (controlled study showing positive effects of cooperative learning in diverse schools on increased cross-racial friendships, with effects sustained over time); M.P. Dawkins & J.H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO EDUC. 394 (1994) (presenting several studies showing that students educated in diverse schools are more likely to attend diverse colleges, work in diverse settings, and live in diverse communities); N. Sonleitner & P.B. Woods, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. OF INTERCULTURAL REL. 1 (1996) (students who attended diverse schools had fewer negative racial stereotypes or prejudice, with effects sustained over the long term); R.E. Slavin & N. Madden, *School Practices that Improve Race Relations*, 16 AM. EDUC. RES. J. 169 (1979); James Banks, *Multicultural Education: Its Effects on Students' Racial and Gender Role Attitudes*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUC. 617 (James Banks & Cherry McGee Banks eds., 1995).

Wygant v. Jackson Bd. of Educ., 476 U.S. 276, 315 (1986) (Stevens, J., dissenting).[26]

2. Diversity improves student learning.

Creating a diverse learning environment in elementary and secondary education improves student learning by providing multiple experiences and perspectives that enrich the learning environment, both inside and outside the classroom. Evidence shows that diversity can promote a broader and deeper understanding of relevant issues among all students, and can improve students' critical-thinking skills by challenging their existing perspectives and encouraging them to examine issues from different points of view.[27] Though often misunderstood, this interest is *not* based on the false notion that race somehow innately controls viewpoint – that all students of the same race view issues the same way, or that all students of different races view issues differently. Rather, it is based on the notion that a student's race or ethnicity – as well as multiple other factors – are likely to affect his or her life experiences and, in turn, his or her personal perspective on certain issues.[28] It is this experiential diversity that affects teaching and learning.

3. Diversity improves students' preparation for employment and economic success.

Creating a diverse learning environment in elementary and secondary education improves students' preparation for employment and further education. Evidence shows that diversity helps all students understand the value of diverse perspectives, become better problem-solvers, and function and communicate more effectively in diverse business settings and in our global marketplace.[29]

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[26] *See also, e.g.*, John Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1765-66 (2000) ("As the world grows more racially and ethnically interdependent every year, reasonable educators might well conclude that every child has a compelling interest in learning more about children of other racial and ethnic backgrounds. From that exposure, children can see for themselves the role that racial background plays (or very often, does not play) in prompting a child to respond to good literature, think about civic issues, to work in groups, and to create new solutions for contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about what African American children think or how Latino children behave, but on precisely the opposite view – that all children share many more things in common than they do differences and that the best device for overcoming lingering racial suspicions or prejudices is exposure, not separation.").

[27] *See, e.g.*, Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, Expert Report (Jan. 1999) (study in higher education showing that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills").

[28] This Court need look no further than its own bench to appreciate the value that diversity brings by enriching discourse with a variety of perspectives and life experiences. For example, this Court in *Virginia v. Black* benefited in oral argument from its own diversity with the presence of personal perspectives on the effects of cross burning. Transcript of Oral Argument 22-24, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001), *cert. granted*, 122 S. Ct. 2288 (2002) (No. 01-1107).

[29] Evidence shows that employers value diversity and persons who are able to function effectively in diverse business settings. *See Investing in People: Developing All of America's Talent on Campus and in the Workplace*, (Business-Higher Education Forum, 2002); *see also* A. Carnevale & R. Fry, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* (Education Testing Service, 2000). This is based in part on evidence showing that diverse work teams, including racially and ethnically diverse teams, generate ideas that are more creative, effective, and feasible than non-diverse teams, but only when diverse teams are able to work together effectively. *See* Poppy Lauretta McLeod *et al.*, *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH, 248,

B. Diversity promotes other compelling nonremedial interests, such as ensuring high-quality educational opportunities for all students.

Racial and ethnic gaps in educational opportunity and achievement persist across the nation.[30] Closing these gaps is a compelling national priority that may necessitate race-conscious policies,[31] including efforts to promote diversity or prevent racial isolation.[32]

260-61 (May 1996) ("Diverse teams that actually utilized the variety of perspectives present outperformed the homogeneous teams."). Moreover, several studies show that students who learn in diverse environments are more likely to choose to work in diverse environments. *See, e.g.*, W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. OF CONTEMP. SOC. 273 (1994).

[30] *See supra* note 13.

[31] There is perhaps no clearer recognition of this fact — in both language and operation — than the recently enacted No Child Left Behind Act of 2001. The Act requires that every state hold every public school and district accountable for the performance of students overall and for each subgroup, including subgroups of racial, linguistic, and ethnic minorities. The Act further ties certain educational assistance and benefits for students, including rewards and sanctions, to accountability measures that are based in substantial part on the way different racial and ethnic subgroups perform on statewide assessments. Thus, this Act, which is at the heart of federal efforts to ensure a high quality education for all public school children, recognizes at its core that certain educational decisions may properly involve considerations of race and ethnicity, including decision regarding the allocation of resources. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002).

[32] *See, e.g., Brewer v. West Irondequoit Central Sch. Dist.*, 212 F.3d 738, 747–53 (2d Cir. 2000) (recognizing a school district's compelling interest in "reducing racial isolation resulting from de facto desegregation").

Research shows that racially isolated learning environments have a negative effect on educational opportunity and that diverse learning environments lead to improved educational opportunity and, thereby, achievement.[33] For example, studies show that attending diverse schools is positively related to improved academic achievement, attendance and graduation from college, and employment in professional positions, especially with regard to minority students.[34]

In sum, diversity in the student body promotes several compelling educational interests that accrue to all students, including enhanced civic values, improved teaching and learning, and improved preparation for employment.[35]

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[33] *See, e.g.*, R.E. Mahard & R.L. Crain, *RESEARCH ON MINORITY ACHIEVEMENT IN DESEGREGATED SCHOOLS* IN THE CONSEQUENCES OF SCHOOL DESEGREGATION 103 (C. Rossell & W. Hawley eds., 1983) (analysis showing positive effects of desegregation on black student achievement related to higher teacher expectations); A.S. Wells & R. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531-555 (1994) (desegregation leads to increased aspirations, higher levels of educational attainment, and increased occupational attainment); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUC. (James A. Banks ed., 1995). James M. McPartland & Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley ed., 1981).

[34] In describing research on the effect of integrated learning environments, a recent report by the Harvard University Civil Rights Project noted that "[s]tudents in integrated environments seem to perform better on tests, perhaps through the increased opportunities available to them . . . . Higher aspirations resulting from integrated schools have been linked to a difference in expectations: predominantly minority schools tend to transmit lower expectations to their students." Frankenberg *et al.*, *supra* note 11at 12-13 (footnotes omitted).

[35] *See, e.g., Parents Involved in Cmty. Sch*, 137 F. Supp. 2d at 1236 (holding that the Seattle School District had a compelling interest in promoting the

IV. Current federal law establishes judicially enforceable limiting principles that apply to race-conscious decisions made by state and local education officials.

Although state and local education officials are entitled to substantial deference to govern public schools in the best educational interest of all children, this deference is not without limits. Current federal law regarding the consideration of race establishes meaningful, judicially enforceable limiting principles that appropriately confine the discretion of education officials when pursuing diversity-related goals. As applied in elementary and secondary education, "strict scrutiny" generally requires that the purpose for considering race be directly related to the core educational mission and that the policy be precisely aligned with that mission. This is consistent with other arenas in which this Court has recognized the unique application of constitutional standards where a public school is seeking to fulfill its core educational goals. Given these limiting principles, the establishment by this Court of a bright-line rule prohibiting any consideration of race to promote diversity in the educational environment would inappropriately and unnecessarily impede the mission of the public schools.

Current federal law establishes that the nonremedial interests that are sufficiently "compelling" to allow for race-conscious decisions in elementary and secondary education

educational benefits of diversity, including enhanced civic values, improved teaching and learning, improved preparation for employment, and increased opportunity and achievement); J.H. Braddock & J.M. McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY AND CHOICE 5 (Feb. 1988) (providing an overview of research evidence showing that racially diverse schools are positively related to better race relations, increased academic achievement, integration in future employment, and more).

will be driven by the core educational mission of the institution, such as a school district's interest in promoting the educational benefits of diversity[36] or a laboratory school's interest in improving urban education in the state.[37] Far from being "amorphous" or "over expansive," *Wygant*, 476 U.S. at 276, this focus helps define the extent to which diversity may be pursued. For example, if public school officials seek to promote the educational benefits of diversity, neither mere "tokenism" nor simple "proportionality" will likely be justified. *See, e.g., Wessman v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998). Rather, school officials must exercise their judgment within those boundaries (and others) to seek an educationally justified critical mass of students necessary to promote the educational benefits of diversity.[38] Furthermore, education officials must have a strong basis in evidence to support their educational judgment that the use of race is necessary

[36] *See, e.g., Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1235-37.

[37] *See, e.g., Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 (9th Cir. 1999); *see also, Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (upholding the use of race in the hiring of correctional officers at a juvenile "boot camp" to promote the core institutional goals of "pacification and reformation" of youth offenders).

[38] *See Bakke*, 438 U.S. at 316-18. (recognizing that a focus on numbers does not in itself constitute a "quota"). Notably, the question of how a federal court can conclude precisely what degree of diversity will fulfill mission-driven goals is a red herring. The "science" of education is not as precise as mathematics, *cf. Guardians Ass'n v. Civil Serv. Comm'n*, 630 F.2d 79, 89 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) ("the science of testing is not as precise as physics or chemistry, nor its conclusions as provable"), where conclusions are, as often as not, purely formulaic. Instead, educational decision-making is dependent upon the experience and judgment of well-informed educators who arrive at conclusions based upon an array of evidentiary factors. Based on this fact, federal courts have consistently afforded a realm of discretion to educators, within defined parameters, to make case-specific, educational judgments that federal courts are ill equipped to second-guess.

to further their educational goals. *See Wygant*, 476 U.S. at 277-78; *Wittmer*, 87 F.3d at 919-20.

Moreover, federal courts have applied "narrow tailoring" principles in concrete ways in the elementary and secondary education context. For example, when public schools pursue the educational benefits of diversity, courts will examine whether public school officials have considered (and used where effective and feasible) race-neutral alternatives before using race-conscious policies. Thus, education officials may be required to use socioeconomic status or other characteristics, and not race, in student assignment to the extent that such action would be equally effective in promoting sufficient diversity to achieve its core educational goals.[39] Furthermore, courts will assess whether a particular use of race by public school officials overburdens any parties. This may in some cases limit diversity options, such as where demographic or geographic conditions would require busing students over long distances to attain sufficient diversity. Where public school officials consider race as one factor among many when assigning students among similarly situated schools, courts are more likely to find that the use of race imposes a constitutionally acceptable burden on all parties. In

[39] This does not mean that the mere existence of race-neutral alternatives – regardless of likely effect or feasibility – provides a sufficient foundation upon which to find a race-conscious policy constitutionally infirm. *But see* Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Grutter v. Bollinger* at 17 – 22 (No. 02-241) (failing to evaluate the efficacy of race-neutral percentage plans in light of case-specific facts). This Court has recognized that there is a "balancing process" in determining what means to adopt. *See United States v. Paradise*, 480 U.S. 149, 171-73, 184 (1987) (rejecting proposed alternatives as "inadequate because [they] failed to address" some of the compelling interests at issue). Depending on the interest at issue, and the feasibility and effectiveness of race-neutral policies, there may in some cases be no appropriate race-neutral alternatives. *See Brewer*, 212 F.3d at 752.

contrast, where the use of race confers or denies a material benefit, a court might reach a different result.[40]

Finally, state and local education officials have come to rely on and apply current federal legal precedent governing the consideration of race in public education, including lessons drawn from this Court's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).[41]

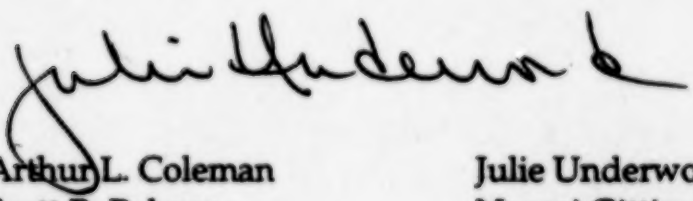
[40] See *supra* note 20.

[41] To assist in this effort, *Amicus* NSBA published the NSBA *Diversity Guide* referenced in this brief to provide guidance for school boards and other state and local education officials on when and how race may and may not be used under current federal law to promote the educational benefits of diversity.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court recognize the panoply of decisions that elementary and secondary education officials must make in order to fulfill their core educational mission for all students, and that this Court preserve the discretion of these officials, within longstanding constitutional parameters, to pursue their compelling diversity-related goals through limited race-conscious means.

Respectfully submitted,



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